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Section 605 (48 Stat. 1103; 47 U.S.C.,
1962 ed., §605) ..... App. 2, 5, 10, 11, 12, 13, 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 560

WILLIAM J. LAVERICK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

Petitioner, pursuant to Rule 24-4, Supreme Court Rules, submits this brief in reply to certain of the contentions raised by the Government in its brief in opposition (Govt. Br.) to the petition for a writ of certiorari.

1. The Government contentions to the contrary (Govt. Br. 6) notwithstanding, the record is amply clear that the questions presented in No. 560 were indeed raised in and considered by the trial court.

(a) Rather than basing the objections solely upon the best evidence rule, hearsay, and variations of these two rules, as the Government contends (Govt. Br. 6), counsel for petitioner specifically objected to the admission of the testimony by the F.B.I. agent and/or the transcripts of the recordings monitored by such agent on the ground that any such testimony was inadmissible under the rule of the "*Rathbun* case, in which the Supreme Court made the decision" on this "complex question". (Colby (37) 5-6.) And because of the importance of the complex problems involved, the trial court, on January 23, 1964, continued for one day the Government's examination of its agent, in order to consider petitioner's several objections to the admissibility of such testimony (Colby (37) 5-9), as well as the memoranda of law filed by petitioner and the Government and accepted by the trial court. Both the petitioner's memorandum (set out, in pertinent part, in Appendix A, *infra*) and the Government's memorandum (Appendix B, *infra*) extensively analyze the holding in *Rathbun v. United States*, 355 US 107, along with certain of its ancestors (including *Goldman v. United States*, 316 US 129) and its progeny. Consequently, there is absolutely no substance or foundation for the Government's conclusion that the court had possibly anticipated an objection which was never made when it suggested that "for some enlightenment on the subject" counsel should read, among "many other cases bearing on this subject", the cases of *Rathbun v. United States, supra; Carnes v. United States*, 295 F 2d 598 (CA 5); *Ferguson v. United States*, 307 F 2d 787 (CA 10); and *Lopez v. United States*, 373 US 427 (Govt. Br. 6-7, n 4; Colby (37) 13); to the contrary, such cases, as well as others, were for the most part specifically called to the court's attention by both

the petitioner and the Government in their memoranda of law. (Appendices A and B, *infra.*)

(b) In addition to *Rathbun, supra,* petitioner further objected to admission of the agent's testimony "as a legal matter under all the legal decisions" (Colby (37) 5), objecting that such testimony, not being that of Snoyer who was a party to such conversations, was inadmissible because it went far beyond attempted corroboration of Snoyer's testimony (Colby (37) 6); and that such testimony was inadmissible because the Government's deliberate conduct in calling the agent to testify by reading into evidence the transcripts, when the key Government witness, Snoyer himself, was available to testify as to such conversations, was a matter of strategy or tactics most prejudicial to petitioner (Colby (37) 9-11). In view of such specific objections it is readily understandable why the trial court deemed it necessary to expressly refer to *Lopez, supra,* in explaining his ruling on admissibility (Colby (37) 13), since such objections are certain of the precise important problems with which the Court expressed concern in *Lopez.* For example, both the majority and concurring opinions in *Lopez* distinguished that case from the present situation by carefully pointing out that such electronically obtained evidence there was not used so as to circumvent production of the key government witness who was a party to the conversation (as in *On Lee v. United States,* 343 US 747); the recording was properly introduced, the Court held, solely to corroborate the contents of "a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose." (373 US at 439; see also Warren, C.J. concurring at 442.) However, such opinions were

APPENDIX A

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Criminal No. 537-62

UNITED STATES OF AMERICA

v.

WILLIAM J. LAVERICK,
HARRISON F. TRYON and
MALCOLM SCHAEFFER,

Defendants.

MEMORANDUM OF LAW

STATEMENT OF FACTS

The Government alleges the following: That this case was initiated when Robert S. Snoyer voluntarily gave a statement to the F.B.I. in Washington on June 8, 1962. As a result of this statement, arrangements were made to record conversations which he had with the defendants in the case at bar. The recording equipment used by the F.B.I. agents was a Magnecord PT6-A2H tape recorder consisting of a record play back amplified type PT 6 JF and a transport mechanism type PT6-A2H.

A single pair of wires were attached to the incoming telephone pair at the connector block in the base board in the apartment and was connected to the "bridge" of

the amplifier. This connecting block is located on the baseboard of the room in which the telephone is located and is about nine feet from it.

Recordings were made of conversations between Snoyer and Laverick; Snoyer and Schaeffer; and Snoyer and Tryon. All of these recordings were made with Snoyer's full knowledge, cooperation and consent.

The defendants contend that none of the recordings referred to hereinabove are admissible in evidence and will reply, in support of their position, upon the law and argument set forth herein

QUESTIONS PRESENTED

1. The first question presented in this memorandum is whether telephone conversations overheard and recorded with the consent of one party thereto are in violation of Section 605 of the Federal Communications Act when recorded in the manner described in the Statement of Facts.

2. The second question presented in this memorandum is whether telephone conversations which have been overheard and recorded are admissible in evidence when statements made by one of the parties to the conversation, who is not a co-defendant in the action, violate the basic rules of evidence.

ARGUMENT

POINT I

THE RECORDING OF A TELEPHONE CONVERSATION WHICH HAS BEEN OVERHEARD AND RECORDED WITH THE CONSENT OF ONE OF THE PARTIES TO THE CONVERSATION IS NOT ADMISSIBLE IN EVIDENCE WHEN THE CONVERSATION OF THE PARTIES HAS BEEN INTERCEPTED IN VIOLATION OF SECTION 605 OF THE FEDERAL COMMUNICATIONS ACT.

The general law on this subject has been adequately referred to in the government's brief and nothing is to be gained by a recital of same herein.

The government, of course, relies upon *Rathbun v. United States, 355 U.S. 107 (1957)* as establishing the basic law now existing, and upon *United States v. Carnes, 295 F. 2d 598*, as summarizing the current authority for its position.

It is not the intention of the defendants to disagree with the holding in either of the two cases cited, or the holding of the many cases cited in the *Carnes* case.

It *is* the intention of the defendants, however, to *differentiate* the case presently before the Court from the cases cited in the government's brief and, in doing so, to argue that because of these differences the holdings in the cited cases are not applicable.

First, let us consider the *Rathbun* case. In its decision the Supreme Court specially took note of the fact that the communication was heard on a "*regularly used* telephone extension". In reciting that the calls were overheard on an extension phone the Court specifically noted that, "This extension had not been installed there just for this purpose but was a regular connection, previously placed and normally used". On Page 136 the Court then noted that if the claim of the Petitioner was accepted by the Court it would have to hold that Congress intended to place a severe restriction on the "ordinary use" by a "subscriber". The Court then went on to state that it would not deny "subscribers" the right to "ordinary use" of the phone, etc. It then concluded by reciting that it would not prohibit a friend, family member, employee or even the police from listening in on a conversation "to which a subscriber is a party".

The defendants herein contend that the recital of the foregoing facts by the Supreme Court was for a reason, i.e to limit its holding to the "ordinary use" of a phone by a "subscriber".

In the case presently before the Court none of the foregoing facts were present. Snoyer, the "consenting" party to the phone conversations was not a "subscriber"; nor was the phone put to its "ordinary use". The first two recordings were made at the Santa Monica office of the F.B.I. and it is Counsel's recollection that the thirteen recordings which followed were all made at a different F.B.I. office.

If the foregoing be true, it is the contention of the defendants that the situation involving the recordings to

be offered by the government is so different from the factual situation existing in the *Rathbun* case that the defendants are not bound by that holding.

There is another important distinction to be noted. In the *Rathbun* case the conversation was overheard on an extension phone. The rationale of the Court was that the receiver of the call had the right to tell another of the conversation. Since he could do this, the Court reasoned, he could, instead, hold out the handset so another could hear it. The Court then concluded that in view of the foregoing there was no difference between the last action and listening in on an extension. The Court then went on to say that when one party called another he always took the risk that someone might listen in on an extension phone. Therefore, the Court held, there was no interception as prohibited by Sec. 605 of the Communication Act.

It may be noted at this point that there is a vast difference between listening in on an extension and listening in as the F.B.I. did in the case before the Court but Counsel will come back to this point.

In the *Carnes* case cited above, and relied upon by the government, the conversation was overheard by means of *an attachment placed on the earpiece of a phone.* The *Carnes* case cites many cases and in each of the cited cases the conversations were overheard either by listening in on extension phones or through induction coils placed on the receiver as a result of which the voice coming through the receiver was magnified.

The *Carnes* case cited with approval *United States*

v. Yee Ping Jong, 26 F. Supp. 69, 70 in which the Court, in upholding the admissibility of an overheard conversation, held that *the conversation was not obtained by a tapping of the wire.*

The *Carnes* case also noted with approval the *Goldman* case, *Goldman v. United States,* (1940) *316 U.S. 129, 86L. Ed. 1322* in which a detectophone was inserted in a partition wall. In holding this admissible the Court noted that "intercept" indicates the taking or seizure *by the way or before arrival at the destined place.*

It is now important to note that in all of the cases cited above (*including the Rathbun case*) the overhearing of the conversations was upheld because, *in every instance* the conversation was overheard either at the same time or after it emanated from the receiver! It is also to be noted that in *None* of the cited cases was anything done or any conversation heard *before* the voice emanated from the receiver. Or, as stated in the *Yee Ping* case, *the conversation was not obtained by a tapping of the wire.* The facts in the case now before the Court are *different* from just about every recorded case (except the *Stephenson* case cited below) and thus, the Court has before it *a case of novel impression!*

As indicated in the Statement of Facts the F.B.I., in overhearing the conversations between Snoyer and others, *tapped the wire* and attached a pair of wires to the connector block in the baseboard; this connector block was about nine feet from the phone. This method of overhearing a conversation, it is submitted, constituted an interception for it intervened between the two parties to the conversation!

In *Carbo v. United States*, (1963) *314 F. 2d 718* the Court stated that it did not understand that the mechanical nature of the method of overhearing was to be the guidepost but apparently did not feel too sure of this statement for it took pains to point out that in that case an induction coil was used; the Court then carefully explained that an induction coil was in the nature of a tuning fork and added: "There is no physical connection with or interruption of the telephone electrical circuit".

The situation described in *Carbo*, it is respectfully submitted, is far different from the case under consideration wherein there *was* a physical connection with *and* interruption of the telephone electrical circuit.

In closing, the Court's attention is directed to *United States* v. *Stephenson*, D.C. 1954, 121 F. Supp. 274, cited in the *Carnes* case. Counsel did not read this case because he did not have the Federal Supplement available. However, the *Carnes* case indicates that the conversation was recorded by a device attached to the wiring of a telephone box and the Court stated: "Both in space and time, the talking in this instance was before the arrival of the communication at the destined place."

The facts in the subject case are much stronger than in the *Stephenson* case and are truly novel for there appears to be no recorded case "on all fours".

In conclusion, the defendants contend that there is no recorded factual case which would be binding on the defendants for no recorded case covers a situation similar to the one before the Court. However, all the cases, from

Rathbun to date, either hold or indicate that an interruption in the call, a connection made *between* the two parties, a tapping of the wires, or a physical connection with or interruption of the telephone electrical circuit would constitute an interception. All of these conditions are to be found in the subject case as a result of the novel manner in which the calls were tapped and it is therefore respectfully submitted that the recordings are inadmissible in evidence.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Criminal No. 537-62

UNITED STATES OF AMERICA

v.

WILLIAM J. LAVERICK,
HARRISON F. TRYON and
MALCOLM SCHAEFFER,

Defendants.

MEMORANDUM OF LAW

David M. Satz, Jr.
United States Attorney

On the Brief:

Matthew P. Boylan, Assistant U. S. Attorney
Robert A. Baime, Assistant U. S. Attorney

STATEMENT OF FACTS

This case was initiated when Robert S. Snoyer voluntarily gave a statement to the F.B.I. in Washington on June 8, 1962. As a result of this statement, arrangements

were made to record conversations which he had with the defendants in the case at bar. The recording equipment used by the F.B.I. agents was a Magnecord PT6-A2H tape recorder consisting of a record play back amplified type PT 6 JF and a transport mechanism type PT6-A2H.

A single pair of wires were attached to the incoming telephone pair at the connector block in the base board in the apartment and was connected to the "bridge" of the amplifier. This connecting block is located on the base-board of the room in which the telephone is located and is about nine feet from it.

Recordings were made of conversations between Snoyer and Laverick; Snoyer and Schaeffer; and Snoyer and Tryon. All of these recordings were made with Snoyer's full knowledge, cooperation and consent.

QUESTION PRESENTED

The question presented in this memorandum is whether conversations overheard and recorded with the consent of one of the conversants is admissible in evidence. The basis for raising the question is Section 605 of the Federal Communications Act which in pertinent part reads:

> " . . . no person not being authorized by the sender shall intercept any communication and divulge or publish the extents, contents, substance, purport, effect, or meaning of such intercepted communication to any person. . . "

ARGUMENT

The first United States Supreme Court case to comprehensively consider the problems raised by Section 605 was *Rathbun v. United States* 355 U.S. 107 (1957). The complaining witness in that case had been threatened by telephone and had notified the police. The police, anticipating further threats, accompanied the witness to his home where they overheard a threatening conversation on a telephone extension. The Court held that this did not constitute a violation of Section 605. The Court's rationale was that there had been no interception of the telephone call. Any apparent interception would be vitiated by the fact that one of the parties had consented. At Pages 110 and 111, the Court said:

> "The clear inference is that one entitled to receive the communication may use it for his own benefit or have another use it for him. The communication itself is not privileged, and one party may not force the other to secrecy merely by using a telephone. It has been conceded by those who believe the conduct here violates Section 605 that either party may record the conversation and publish it (citing *United States v. Polakoff* 112 F.2d 288). The conduct of the party would differ in no way if instead of repeating the message, he held out his hand set so that another could hear out of it. We see no distinction between that sort of action and permitting an outsider to use an extension telephone for the same purpose."
>
> " . . . Common experience tells us that a call to

a particular telephone number may cause the bell to ring in more than one ordinarily used instrument. Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation. When such takes place, there has been no violation of any privacy of which the parties may complain. Consequently, one element of Section 605, interception, has not occurred."

It is apparent that, under the reasoning of *Rathbun*, the recorded conversations in the present case are not objectionable. In the case at bar, one of the parties to the conversation, Snoyer, invited members of the F.B.I. to listen in on the conversation. Then the F.B.I.'s recording of that conversation cannot be considered as an "interception".

There are several recently decided cases directly on point. In *Carbo v. United States* 314 F.2d 718 appeal pending (9th Cir. 1963), a person named Leonard had received threats by telephone. He notified the F.B.I. and they, by means of an induction coil, recorded the next threat which he received. The Court held, citing *Rathbun*, that the use of an induction coil in recording a conversation with the permission of one of the parties was not an interception within the meaning of 47 U.S.C., Section 605.

A similar case is *Wilson v. United States*, 316 F.2d 212 (9th Cir. 1963). In that case, a "special employee" of the Government placed a call to the defendant. The

ensuing conversation contained incriminating statements with regard to the sale of narcotics. The "special employee" recorded the conversation by means of a "special device" attached to the receiver. This "special device" also permitted a Federal Agent to overhear the conversation. At the trial, only the "special employee" testified with regard to the contents of the conversation. However, objections were made to the use of the listening device in the investigation. The Court held at Page 213:

> "Assuming for argument that the point is available, the cases are clearly adverse to appellant. . . (citations omitted) . . . "
>
> "The cases hold that testimony as to a telephone conversation listened to with the consent of only one of the parties to the conversation does not constitute an interception under Section 605 of the Federal Communication Act (47 U.S.C.A. Section 605); and (except for Rayson and Bookie, which did not reach the question) that such testimony does not become inadmissible simply because it was recorded by or overheard by an electrical or mechanical device attached to an extension telephone or telephone wiring to the locality of the consenting party." See also *Broadus v. United States*, 317 F.2d 212 (5th Cir. 1963); *Ladery v. Commission on Licensure to Practice, etc.* 261 F.2d 68 (C.A.D.C. 1958); *United States v. Williams*, 311 F.2d 721 (7th Cir. 1963).

The case of *Ferguson v. United States* 307 F.2d 787 (10th Cir. 1962) is also Apposite. There, as in *Wilson*, a

volunteer "special employee" of the Government recorded an incriminating statement by means of a device on an extension phone. The 10th Circuit held that the evidence was admissible and that no violation of Section 605 of the Federal Communications Act had taken place. See also *United States v. Williams* 311 F.2d 721 (7th Cir. 1963) Cert. denied, 374 U.S. 812, 83 S. Ct. 703, 10 L. Ed. 2d, 1035 (1963) where the 7th Circuit held evidence to be admissible on similar facts.

The case of *United States v. Carnes*, 295 F.2d, 598 cert. denied, 369 U.S. 891 (5th Cir. 1962) examines the present status of Section 605 of the Federal Communications Act. In the *Carnes* case a Federal officer, working undercover arranged to buy non-tax-paid whiskey from the defendant. During the negotiations for this sale the Federal agent recorded several conversations which he had with the defendant. These recordings were made by means of an attachment placed on the earpiece of the agent's telephone. The Court held that the recordings made by the agent were admissible in evidence and that they had not been procured in violation of the Federal Communications Act. In the course of the opinion the court deals comprehensively with the other decided cases in this area. The court points out that even prior to *Rathbun*, most of the Federal District Courts were accepting evidence obtained through the recording of telephone conversations if these recordings were made with the consent of one of the parties to the conversation. Judge Wisdom pointed out:

> "The Supreme Court, in *Rathbun v. United States*, 1957, 355 U.S. 107 78 S. Ct. 161, 2 L.Ed.

2d 134, stamped its approvel on the conclusion supported by this increasing weight of authority. Police officers were allowed to listen on an extension line to a telephone conversation in which the defendant threatened the life of the man he had called. In holding the testimony admissible, the Supreme Court scotched the theory that the consent of each party to a conversation must be obtained before a communication may be divulged."

The Court then went to summarize the effect of *Rathbun* and the later cases upon Section 605. The Court said:

"Two major principles may be extracted from these cases. First, testimony as to a telephone conversation listened to with the consent of only one of the parties to the conversation is not inadmissible under Section 605. Second, such testimony does not become inadmissible simply because it was recorded by an electrical or mechanical device attached to an extension phone or telephone wiring at the locality of the consenting party. The significant fact in the cases where eavesdropping has been approved is that a third person is listening to a conversation directly or indirectly through an electrical device, with the consent, and often assistance, of one of the parties, and that the other party does not know that his words are overheard. Both the consenting party and the third party would be free to divulge the contents of the conversation in the courtroom or elsewhere; the only function served by the recording is to preserve a permanent and

> accurate record of the conversation. In the case at bar this point is particularly clear since the recording was made by the very individual who was participating in the conversation. Taking a sensible view of it, the only difference between a person testifying to a conversation which he participated in or overheard and a recording of the conversation is that the recording has the advantage of furnishing trustworthy evidence (assuming a showing that the tape has not been tampered with)."

The *Carnes* case thus serves to summarize the authority with regard to the question with which we are herein concerned. Although there had been some doubt expressed in a minority of the jurisdictions as to the admissibility of evidence obtained through a listening device, the *Rathbun* case set a standard which all subsequent cases cited herein have followed. It is, therefore, evident that the prohibition of Section 605 is limited to an "interception" made without the consent of either of the parties. The interpretation given to the *Rathbun* case in the 9th, 5th, 10th, 7th, and District of Columbia Circuits is well supported by the rationale of that case. The facts of the case at bar come squarely within the aforementioned authority and, therefore, the recorded conversations which were made with Snoyer's consent and cooperation are admissible.